

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1060

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
ORLANDO DIAZ,
Defendant-Appellant.
-----x

B

Docket No. 77-1060

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ORLANDO DIAZ
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

9-16-76 / Filed memo-end, on motion docketed 9-10-76- motion for order of dismissal...denied as frivolous.

9-22-76 / Pre-trial conference held. Trial set for 10-20-76. 2 6-21- 3 1
Tennay, J.

10-11-76 / Filed def's affidavit, in support of request for a hearing to determine the prejudicial effect of the delay between the alleged facts and arrest, etc.

10-20-76 / Jury trial begun before Judge Tennay.

10-21-76 / Trial cont'd.

10-22-76 / Trial cont'd. Jury unable to agree upon a verdict. Jury discharged. Trial set for 10-26-76 at 10AM. Bail cont'd. Tennay, J.

11-3-76 / Case reassigned from Judge Tennay to Judge Metzner.

11-15-76 / Filed Transcript of record proceedings, dated 10-20, 21, 22-76

11-22-76 / Case reassigned from Judge Metzner to Judge Eriant.

12-3-76 / Def's Proposed Questions for the Voir Dire.

12-7-76 / Deft. Orlando Diaz (atty. Leonard Joy) present. Jury Trial Begun

12-8-76 / Trial Cont'd

12-9-76 / Trial Cont'd

12-10-76 / Trial Cont'd & concluded. Jury verdict guilty on cts 1&3.

PSI ordered. Sent. adj'd to 1-21-77. Bail cont'd...Eriant, J.

12-13-76 / Filed Court Exhibit # 7.

1-21-77 / Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - The deft is hereby committed to the custody of the Atty Gen. for impr. for a period of FOUR (4) YEARS on each of counts 1 & 3, to run concurrently with each other. Pursuant to Sec 841 of Title 21, of the USC, deft is placed on Special Parole for a period of Three (3) Years, to commence upon expiration of confinement. REMAINDER. So ordered Eriant, J. All copies issued.

1-21-77 / Remand issued.

1-21-77 / Filed NOTICE OF APPEAL by deft to the USCA from the Judgment of 1-21-77. w/a to deft and US Atty.

A TRUE COPY

RAYMOND F. BURCHARDT, Clerk

By *[Signature]*
Deputy Clerk

JUDGE BRIEANT

USA-33s- 510 - IND./INF. (Conspiracy to distribute and possess
Rev. 5-27-72 intent to distribute narcotic drug.)

HWG:mkb
75-2595

76 CRIM. 0599

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

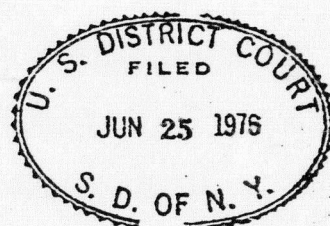
- v -

LUIS VALERIO, ORLANDO DIAZ,
JOHN DOE, a/k/a "Felix", and
JOHN DOE, a/k/a "Felix' Brother",

Defendants.

INDICTMENT

76 Cr.



The Grand Jury charges:

1. From on or about the 27th day of June, 1974 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, LUIS VALERIO, ORLANDO DIAZ, JOHN DOE, a/k/a "Felix", and JOHN DOE, a/k/a "Felix' Brother",

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

FILED

28 1976

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

1. On or about June 27, 1974, defendant LUIS VALERIO met with an undercover officer of the Drug Enforcement Administration.
2. On or about June 28, 1974, defendant JOHN DOE, a/k/a "Felix" showed the undercover officer a plastic bag containing white powder.
3. On or about June 28, 1974, defendants LUIS VALERIO, JOHN DOE, a/k/a/ "Felix" and JOHN DOE, a/k/a "Felix' Brother" met at 42 Sickle Street, New York, New York.
4. On or about June 28, 1974, defendant ORLANDO DIAZ handed a bag of cocaine to defendant JOHN DOE, a/k/a "Felix".

(Title 21, United States Code, Section 846.)



COUNT THREE

The Grand Jury further charges:

On or about the 28th day of June, 1974, in the Southern District of New York, LUIS VALERIO, ORLANDO DIAZ, JOHN DOE, a/k/a "Felix and JOHN DOE, a/k/a "Felix' Brother", the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 110 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

JUDGE BRIANT

7 6 CRIM. 5599

Form No. USA-33a-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

LUIS VALERIO, ORLANDO DIAZ,
JOHN DOE, a/k/a "Felix", and
JOHN DOE, a/k/a "Felix" Brother",

Defendants.

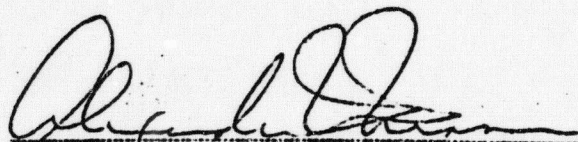
INDICTMENT

(21 U.S.C. §§ 812; 846; 841(a)(1)
& 841(b)(1)(A); 18 U.S.C. § 2.)

ROBERT B. FISKE, JR.

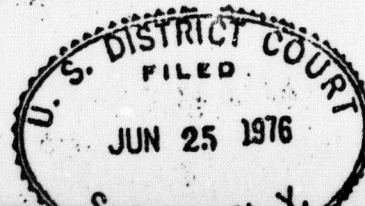
United States Attorney.

A TRUE BILL



Foreman.

FPI-55-2-19-71-20M-6959



DECEMBER 11, 1976

55-76 - Filed Indictment. Knapp J.

7-1-76 Deft. Valerio not present, Court directs entry of n.g. plea. B/W ordered.

Deft. Diaz - present (Murray Mogel), please n.g. Bail cont'd.

Deft. John Doe not present, Court directs entry of n.g. plea. B/W is ordered.

Case assigned to Tenney, J.

J. Knapp J.

9/24/76 - (enlendo DIAZ)

TOM CONCANNON, ESQ

P.T.C. - trial - 10-20-76

Tenney, J.

10/20/76 - (enlendo DIAZ) - TOM CONCANNON, ESQ

TRIAL begun before Tenney, J. (Jury)

(Interpretation
Surrey - DENA
Kohn)

10/21/76 - TRIAL continued - Interpretation present

12/7/76 - trial continued - jury unable to
agree upon a verdict. Jury discharged.
Trial set for 12/26/76 AT 10 A.M.
Bail continued - Terrell, J.

12/7/76 Deft. Orlando Diaz (atty. Leonard Joy) present.
Jury Trial begun.

12/8/76 Trial cont'd.

12/9/76 Trial cont'd.

12/10/76 Trial cont'd + concluded. Jury verdict guilty on
cts 1+3. PSI ordered. Sent. adj'd. to
1/21/77. Bail cont'd.

Briant, J. J.

1/21/77 Deft. (atty. Leonard Joy)

cts 1+3 4 yrs. conc.

3 yrs. Special Parole.

Remanded
Advised of Right to appeal

Briant, J. J.

2 A F T E R N O O N S E S S I O N3
4 2:05 P.M.5 THE CLERK: The Court is about to charge
6 the jury. Everybody remain in their places until the
7 completion of the Court's charge.8 THE COURT: Mrs. Reilly and members of
9 the jury:10 We are now at that stage of the trial
11 where you are about to undertake your final function
12 as jurors. Here you perform one of the most sacred
13 obligations of citizenship, that is acting as ministers
14 of justice.15 You are to discharge this final duty in
16 an attitude of complete fairness and impartiality, as
17 I emphasized when you were first selected, without
18 bias or prejudice for or against the government, or the
19 defendant, as parties to this controversy.20 Let me state the fact that the government
21 is a party entitles it to no greater consideration than
22 that accorded to any other party to a litigation. By
23 the same token it is entitled to no less consideration.
24 All parties, individuals and government alike, stand
25 as equals before the bar of justice in this court and in
your deliberations.

1 BSpa
2 Your final role here is to decide and pass
3 upon the fact issues of this case. You are the sole and
4 exclusive judges of the facts. You determine the weight
5 of the evidence. You appraise and decide the credibility
6 or truthfulness of each of the witnesses, and you
7 draw the reasonable inferences or conclusions from the
8 evidence, and you resolve such conflicts as there may be
9 in the evidence.

10 My final function here is to instruct
11 you as to the law and it is your duty to accept these
12 instructions as to the law and then apply them to the facts
13 of the case as you may find them to be. You are not to
14 consider any one instruction I give you alone as stating
15 the law but you must consider all my instructions taken
16 together as a whole.

17 With respect to any fact matter, it is your
18 recollection and yours alone which governs. I have said
19 that several times. Anything that the lawyers, either
20 for the government or the defendant, may have said with
21 respect to matters in evidence or testimony, whether
22 they said it during the trial in a question, or in
23 arguments or in summation, is not to be substituted for
24 your own recollection of the evidence. Anything I might
25 say during the trial, or anything I might refer to during

the course of giving these instructions as to any testimony or any matter in evidence, is not to be taken in place of your own recollection.

Each of the attorneys not only have the right but it is their duty to make objections, to press whatever legal theories or arguments they may have. They are simply performing their duty, and any evidence as to which an objection was sustained by the Court, or anything ordered stricken out by the Court, must be disregarded by you in its entirety. It is not my function here to favor one side or the other, or to indicate to you the jury in any way that I have any opinion as to the truthfulness of any witness, or as to the guilt or innocence of the defendant. That is your function. It is yours alone to decide, and I leave it entirely to you. So please don't reach any conclusion that I may have some opinion in any matters concerning this case, or that I may have some attitude, or that I may tend to favor one side or the other in the case. I do not.

As I told you at the beginning, the indictment here itself is no evidence of the crimes charged. Instead, an indictment is merely the method or procedure under the law whereby a person accused of a crime by a Grand Jury is brought into court to have his case determined

1 by a trial jury, such as yourselves, and therefore the
2 indictment must be given no evidentiary value. It
3 shall not be treated by you as any evidence or proof of
4 a defendant's guilt, and no weight or significance
5 whatsoever is to be given to the fact that an indictment
6 has been returned. It shall be treated by you only as an
7 accusation.
8

9 The defendant has pleaded not guilty and
10 thus the government has the burden of proving the
11 charges beyond a reasonable doubt before anyone may be
12 convicted of any crime.

13 A defendant doesn't have to prove his
14 innocence. On the contrary, he's presumed to be
15 innocent of the accusations contained in the indictment.
16 This presumption of innocence was in his favor at the
17 start of the trial, as I believe I've told you before,
18 and it continued in his favor throughout the entire trial,
19 and is in his favor now and remains in his favor during
20 the course of your deliberations in the jury room. The
21 presumption of innocence is removed as to a particular count
22 only if and when you the jury are satisfied that the
23 government has sustained its burden of proving the guilt
24 of the defendant beyond a reasonable doubt as to that
25 count that you are then considering.

1 ESpa
2 Of course, unless you are so convinced you
3 must find him not guilty as to that count.

4 I mentioned earlier there are two counts
5 here before you. You will decide each of them separately,
6 according to the evidence and following my instructions as
7 to the law, and you will come up with a separate verdict
8 as to each count.

9 The question naturally comes up, what is a
10 reasonable doubt? Well, members of the jury, those
11 words almost define themselves. It's a doubt founded on
12 reason, arising out of the evidence in the case, or the
13 lack of evidence; it's a doubt which a reasonable person
14 has after carefully weighing all the evidence. Reasonable
15 doubt is a doubt that appeals to your reason, to your
16 judgment, to your common sense, and to your experience.
17 It is not caprice or whim or speculation or conjecture
18 or suspicion. It is not the excuse to avoid the
19 performance of an unpleasant duty, and it is not
20 sympathy for a defendant. If, after a fair and impartial
21 consideration of all the evidence, you can candidly and
22 honestly say you are not satisfied of the guilt of the
23 defendant, that you don't have an abiding conviction of
24 the defendant's guilt on the particular charge you are
25 then considering, in sum, if you have such a doubt as would

1 BSpa
2 cause you as prudent persons to hesitate before acting
3 in matters of importance to yourselves, then you have a
4 reasonable doubt, and in that circumstance it's your duty
5 to acquit.

6 On the other hand, if, after such an
7 impartial and fair consideration of all the evidence,
8 you can candidly and honestly say you do have an abiding
9 conviction of a defendant's guilt, such a conviction as
10 you would be willing to act upon in important and weighty
11 matters in the personal affairs of your own life, then
12 you have no reasonable doubt, and under those circumstances
13 it is your duty to convict.

14 Reasonable doubt does not mean a positive
15 certainty or beyond all possible doubt. If that were
16 the rule few men, however guilty they might be, would
17 ever be convicted, because it is practically impossible
18 for a person to be absolutely and completely convinced of
19 any disputed fact which by its nature is not susceptible
20 of mathematical proof, and for that reason the law in
21 a criminal case is that it is sufficient if the guilt
22 of the defendant is established beyond a reasonable doubt,
23 not beyond all possible doubt.

24 Members of the jury, the indictment
25 in this case now contains two counts and each count charges

1 a separate crime, and they must each be considered
2 separately. Of course you will be asked to give a separate
3 verdict as to each count.
4

5 You will see in the indictment, if you ask
6 to look at it, that the numbers of the counts aren't sequential.
7 That's because counts which pertain solely to other people,
8 and which are of no concern to you, have been eliminated
9 so there won't be any distraction, and you must not
10 engage in any conjecture or speculation as to what or who
11 the other counts concerned.

12 Mr. Diaz is the only defendant on trial
13 before you. He is the only person with respect to
14 whom you will be asked to announce a verdict, based on
15 his own actions. In considering his case you may have
16 to determine the nature and extent of the participation or
17 activities of Louis Valerio, John Doe, also known as Felix,
18 and the other John Doe, also known as Felix' brother, and
19 others who you may find to have been conspirators, and
20 you will consider their actions simply for the purpose
21 of determining if there was a conspiracy which came
22 into existence.

23 In this connection, you are not to concern
24 yourselves with or speculate on the reasons why only
25 Mr. Diaz is being tried here before you today, or why the

1 other defendants aren't being tried here. These are
2 matters which only concern the Court and aren't for
3 you to consider.
4

5 You will have to bear in mind that guilt
6 is personal. Whether or not this defendant on trial before
7 you has been proved guilty beyond a reasonable doubt
8 must be determined separately with respect to him, solely
9 on the evidence presented against him, or the lack of
10 evidence, and without regard to the evidence as to the
11 guilt of any of these other persons that I have mentioned.

12 For your guidance in considering evidence I
13 will tell you there are two classes of evidence recognized
14 and admitted in courts of justice, upon either of which
15 the jurors may find an accused person guilty of a
16 crime. One is called direct evidence and the other is
17 called circumstantial evidence.

18 Direct evidence tends to show the fact in
19 issue without any need for any other amplification,
20 although of course there is always the question as to
21 whether it's to be believed.

22 Circumstantial evidence is evidence that
23 tends to show facts from which the fact in issue may
24 reasonably be inferred. It is evidence that tends to
25 prove the fact in issue by proof of other facts which have

2 a legitimate tendency to lead your mind to infer or
3 conclude that the facts sought to be established are
4 true.

5 There is a traditional example given in
6 the courthouse here about the use of circumstantial
7 evidence. Sometimes it is difficult to tell merely
8 by looking out of the window of a courtroom such as
9 those upstairs, which are high in the building and look out
10 on the street, to tell whether it's raining out or not.
11 But if you look out the window and the sun is not
12 shining and you see the people passing by in the streets
13 have their umbrellas up, you usually will come to the
14 conclusion that it must be raining.

15 Here you have direct evidence, the
16 evidence of your own senses. You can see that the
17 umbrellas are up. That fact constitutes circumstantial
18 evidence from which you are entitled under all of the
19 surrounding circumstances of the example I gave, to conclude
20 that it must be raining. In other words, circumstantial
21 evidence consists of facts proved from which the jury
22 may infer by a process of reasoning other facts that are
23 in issue.

24 Circumstantial evidence, if believed, is
25 of no less value than direct evidence, for, in any case, you

1 must be convinced beyond a reasonable doubt of the
2
3 guilt of a defendant before he may be convicted of a crime.

4 The evidence in this case consists of the
5 sworn testimony of the witnesses, and all exhibits which
6 have been received into evidence, and all facts or testimony
7 which have been admitted or stipulated.

8 I told you earlier that a stipulation
9 was equivalent to testimony or evidence, and could be so
10 treated by you.

11 Statements or arguments of attorneys,
12 however, aren't evidence in the case. When the attorneys
13 for both sides stipulate or agree as to a fact, or as to
14 what testimony would be if a person such as a chemist
15 were brought in here to testify under oath, you may
16 accept the stipulation as evidence, and you may regard that
17 fact as proved, if you are satisfied with the stipulation.

18 However, you are the judges of all issues of
19 fact and it is for you to determine all factual questions
20 in the case.

21 In determining what evidence you will
22 accept as true, you will make your own evaluation of the
23 testimony given by each of the witnesses, and you will
24 determine for yourselves what you believe to be the truth
25 and the degree of weight or significance that you choose

1 to give to that testimony. The testimony of a witness
2 may fail to conform to the facts as they occurred because
3 the witness may intentionally be telling a falsehood, or
4 because maybe the witness didn't accurately hear or see
5 what he testified about, or because his recollection of the
6 event is faulty, or because he hasn't expressed himself
7 clearly in giving testimony -- there is no magic formula
8 to evaluate testimony. You take with you in your
9 deliberations all of your experience and **background of your**
10 **everyday lives.** Each of you in your everyday affairs
11 determine for yourselves the reliability of statements
12 made to you by other people, and the same tests you use
13 in your everyday dealings are the tests which you apply
14 in your deliberations as jurors.

16 You may, of course, consider the interest
17 or lack of interest of any witness in the outcome of the
18 case. A witness who is interested in the outcome is not
19 necessarily unworthy of belief, but interest of a witness
20 is a factor or a possible motive which you may consider
21 in determining the weight and credibility to be given
22 to his testimony.

23 In weighing testimony you consider whether
24 the testimony of a witness is corroborated or borne out
25 by the testimony of others, or by documentary evidence, or

2 by exhibits.

3 You may consider the manner in which the
4 witness gave his testimony on the stand, the appearance and
5 conduct of the witness, his demeanor, the opportunity the
6 witness had to observe and remember the facts concerning
7 which he testified, and the probability or improbability
8 of the testimony in the light of all the other events in
9 the case.

10 These are all items to be taken into
11 your consideration in determining the truthfulness and
12 weight, if any, that you will assign to that witness'
13 testimony. If these considerations make it seem to you that
14 there is a discrepancy in the evidence, you will have to
15 consider whether this can be reconciled by fitting the con-
16 flicting items together, and if that is not possible, then
17 you should consider and determine which of the conflicting
18 versions, if any, you will accept.

19 If a witness is shown to have knowingly
20 testified falsely concerning any material matter in a
21 trial, you have a right to distrust that witness' testimony
22 in other things, and you may reject all of the testimony
23 of that witness or you can give it or such parts of it
24 such credence as you think it deserves.

25 There has been some reference to the use of

a person referred to by the nickname of Junior as a informant or informer. The services of informants are availed of by government agents at times to obtain introductions to persons suspected of violating the law, and there are certain types of crimes where, without using informants, detection would be extremely difficult.

And frequently the use of informants is necessary to get leads for introductions to persons allegedly engaged in illegal activities, or otherwise to aid enforcement officers.

The law has always permitted the use of informants provided the rights of a defendant are not violated, and whether or not you approve of the use of an informant in an effort to detect violations of the law, is not to enter into your deliberations in this case.

Also, there is no requirement in any particular trial for the government to call the informant as a witness in a narcotics case or to reveal him or to expose him in a public courtroom, to testify to his name or anything like that, and you may draw no inferences one way or the other from the fact that the informant was not called as a witness. You are to decide this case on the evidence that was produced, or on any determination you may make with respect to any lack

2 of evidence, but in reaching your verdict, you are not
3 to engage in any speculation or guesswork as to what some
4 absent witness might have testified to if he had been
5 called as a witness in the trial.

6 Members of the jury, you have heard the
7 testimony of Officers Marrero and Kieran and Bisbee,
8 members of the New York City Police Department, and I
9 instruct you that the testimony of police officers or
10 drug enforcement agents is entitled to no greater weight
11 than the testimony of any other person merely because of
12 his occupation. By the same token, the testimony of such
13 a witness is entitled to no less weight.

14 I instruct you that it was perfectly
15 proper for these agents, as part of their duties, to arrange
16 for buys of narcotics in an undercover fashion and to keep
17 individuals suspected of dealing in drugs under
18 surveillance, if that's what they did.

19 As to their credibility and the weight and
20 significance of their testimony, members of the jury,
21 this is entirely a matter for you to decide in
22 accordance with the instructions for evaluating testimony
23 generally, which I have already given to you. You apply
24 these same tests to the testimony of these law enforcement
25 officers as you would to any other witness.

1 A defendant in a criminal case is not
2
3 called upon to prove his innocence. As I told you earlier,
4 the burden is upon the government to prove the accused
5 guilty beyond a reasonable doubt as to every essential
6 element of the crime charged in any particular count of
7 the indictment.

8 The defendant has the right to rely upon the
9 failure of the prosecution to establish such proof.
10 The defendant may also rely upon evidence brought out
11 during cross examination of the government's witnesses,
12 and the law does not impose upon a defendant the duty
13 of producing any witness or testifying or doing anything
14 in that nature at all. You should not speculate,
15 therefore, as to why the defendant didn't testify. There
16 may be many reasons why a defendant may decide not to
17 do so, and that's his absolute right, and I instruct you,
18 you are not to speculate as to such a matter and not to
19 give it any consideration or discussion whatsoever. You
20 may not draw any inferences whatsoever from the defendant's
21 failure to take the stand.

22 The identification of this defendant must
23 appear to your satisfaction beyond a reasonable doubt.
24 If the government fails to prove this then it has failed
25 to prove its case against this defendant, and he would be

entitled to a verdict of not guilty.

You must determine the question of identification from all the direct evidence and the circumstantial evidence that's been adduced before you. It is for you to determine from that evidence whether or not there has been a proper identification of this defendant and whether or not this is the person who committed the crimes charged in the indictment.

To be more specific, you've heard the testimony of Officer Marrero that he first saw the defendant talking with Mr. Valerio outside the apartment on Sickie Street, and also that he had an opportunity to observe him again after Mr. Diaz, or the person claimed to be Mr. Diaz, returned with the station wagon, the car; he then identified Mr. Diaz as the man he saw on these occasions, and you've heard identification testimony also from Officer Kieran, and also from Detective Bisbee, and you have Marrero's testimony that Mr. Diaz shook hands with him and apologized for the delay.

Identification testimony is an expression of belief or impression or opinion by the witness. Its value depends on the opportunity the witness had to observe the person at the time of the offense, and to make a reasonable identification later.

In appraising the identification testimony of a witness you should consider the following factors: Did the witness have the capacity and an adequate opportunity to observe the alleged offender at the time of the offense?

This will be affected by such matters as how long or short a time they were in each other's presence, **how far**, away or how close the witness was from the person being identified, how good or bad the lighting conditions were, and whether the witness had had an occasion to observe or know the person at any other time.

You must also consider the credibility of each identification witness in the same way as you will determine the credibility of any other witness, as I've previously explained to you.

Again, I want to emphasize that the burden of proof on the government extends to every element of the crime charged, and specifically includes the burden of proving beyond a reasonable doubt the identity of the person on trial as the perpetrator of the crimes charged.

If, after examining all of the evidence in the

case, you have a reasonable doubt as to the accuracy of the identifications, you must find the defendant not guilty. On the other hand if you are convinced beyond a reasonable doubt that Mr. Diaz was the man, then you should return a verdict of guilty, provided, of course, that you also find that the government has proven all of the essential elements of the crime charged beyond a reasonable doubt as I will instruct you concerning the elements thereof.

Let's leave these general matters for a moment and turn to the specific charges against the defendant Orlando Diaz.

The first count, count one, charges a conspiracy. It charges that the defendant Orlando Diaz and Louis Valerio and John Doe, also known as Felix, and another John Doe, also known as Felix' brother -- I might say to you John Doe has no significance, it's just a name given for convenience to a person whose true name is not known, except they know him by the first name or nickname of Felix, or that he was introduced as Felix' brother, and it is charged that this defendant, and those three people, together with others unknown to the Grand Jury, conspired together to violate the federal narcotics laws.

I am going to refer to this count, count one,

as the conspiracy count. As I told you earlier, the second count does not concern the defendant Diaz. The third count of the indictment, which for convenience I will call the substantive count, charges the defendant Orlando Diaz, and others, with possessing with the intent to distribute, and distributing, approximately 110 grams of cocaine. That is called the substantive count.

I will now read to you from the indictment.

"The Grand Jury charges: One, from on or about the 27th day of June, 1974, and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York, Louis Valerio, Orlando Diaz, John Doe, also known as Felix, and John Doe, also known as Felix' brother, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together, and with each other, to violate Sections 812, 841(A)1 and 841(B)1(A) of Title 21 of the United States Code.

"Two, it was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule 2 narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(A)1 and 841(B)1(A) of

1 BSpa

824

2 Title 21 of the United States Code.

3 "Overt acts: In pursuance of the said
4 conspiracy, and to effect the objectives thereof, the
5 following overt acts were committed in the Southern
6 District of New York." And there are four overt acts listed,
7 and I will read them in a few moments.

8 Except for the overt acts, that constitutes
9 a reading of count one. I will come to count three later on.

10 This count charges a violation of Title
11 21 of the United States Code, Section 846, and it is not
12 important for you to remember that section number, but
13 I do want you to pay close attention at this point, because
14 I am about to set forth for you the three essential
15 elements of the crime of conspiracy in violation of that
16 section.

17 In order to convict the defendant on
18 count one each of the following three essential elements
19 must be established to your satisfaction beyond a reasonable
20 doubt: If your deliberations tell you that any one of
21 these three elements has not been established beyond a
22 reasonable doubt, you are to find a verdict of not guilty
23 on count one and then go on and consider count three.

24 If you are convinced that all three elements
25 have been proved beyond a reasonable doubt then it is your

duty to convict on count one.

These are the three elements, and please listen to these very carefully: First, that the conspiracy charged in count one did in fact exist, that is, that two or more of those persons named therein agreed together, and with each other, to violate the federal narcotics laws at some point on or about the time period alleged in the indictment, and in the fashion therein set forth, which is mentioned from being June 27th, 1974 up until the filing of the indictment on June 25th, 1976. That's the first element.

The second element that the defendant Orlando Diaz knowingly and willfully associated himself with the conspiracy and did so with the requisite criminal knowledge and intent. In short, that he became a member of the conspiracy and did so knowingly and willfully.

The third element of the crime of conspiracy, as charged in count one, is that one of the conspirators, any one of them, committed, in the Southern District of New York, at least one of the overt acts set forth in the indictment on or about the time and place alleged.

I will speak with you briefly about each of these elements one at a time. The first element of

count one you must determine is whether the conspiracy charged in the indictment did in fact exist.

What is a conspiracy? Well, for our purposes in this case, a conspiracy is simply a combination or an agreement or an understanding reached by two or more members to act together and in concert to commit the crime mentioned in the indictment.

A narcotics conspiracy, as charged by the government in this case under count one of the indictment, and as prohibited by law, may be thought of as a chain of people extending from the mountains in South America, or wherever the cocaine originates, to the market in New York, in this district, where the ultimate consumers are found.

The contention here is that the defendant Orlando Diaz, on trial before you, was one of the links in that chain. Your common sense will tell you that in order to make cocaine available for ultimate consumption in New York, different people must play different parts, and there will be different links in the chain reaching from South America to the point of ultimate consumption here.

In order for this defendant to be found guilty of the crime of conspiracy to violate the narcotics

1 laws, it must appear to your satisfaction beyond a
2 reasonable doubt that he agreed, whether tacitly or explicitly,
3 whether in words or by his actions, to work together with
4 at least one other person, in this case, Louis Valerio,
5 or John Doe also known as Felix, or John Doe also
6 known as Felix' brother, in order to achieve a common
7 criminal purpose of distributing this narcotic drug.
8 The gist of the crime of conspiracy is the unlawful
9 combination or agreement by two or more people to violate
10 the law together.
11

12 The crime of conspiracy is entirely
13 separate and distinct and different from the violation
14 of the law or laws which may have been the object or the
15 purpose of the conspiracy. Thus, if a conspiracy exists,
16 even if it should fail in its purpose, the individuals
17 in it may still be convicted of the crime of conspiracy.
18 The government is not required, with respect to count one,
19 to prove that an actual violation of the narcotics law
20 took place, although that is the contention here, but need
21 only prove that the conspiracy came into existence, for
22 the purpose, and at or about the times alleged, and
23 that at least one overt act was committed by a conspirator
24 in furtherance of its purposes, and that this defendant
25 on trial before you was a knowing, willful and intentional

member of it. I will come to that a little bit later.

The government is not required to prove, in order to establish that a conspiracy existed, that two or more people sat down around a table and entered into a formal agreement, setting up any partnership to deal in cocaine. Indeed, that would be extraordinary if there were any such formal agreement.

Your common sense will tell you that when people in fact enter into the criminal conspiracy efforts much is left to the understanding, unspoken understanding. Conspirators usually don't submit their agreements in writing or acknowledge them before a notary public, nor do they publically broadcast or advertise their plans or their activities.

From its nature a conspiracy is almost invariably secret in its origin and execution, but it is sufficient to prove the existence of a conspiracy if two or more persons, in any manner, through any contrivance, impliedly or tacitly, came to an understanding to violate the law together. The express language or specific words aren't required to indicate assent to or attachment to a conspiracy, nor is it required that you should find all the co-conspirators named in the indictment joined into the conspiracy in order to find that it existed

as charged.

As to the first element you need only find that one of the co-conspirators entered into an unlawful agreement with one or more other persons as charged in order to find that the conspiracy existed.

In determining whether the conspiracy charged in this indictment actually existed you may consider all the evidence of the acts and conduct of the alleged conspirators as a whole, each of them, and the reasonable inferences or conclusions to be drawn from such evidence.

If, upon consideration of all the evidence, you find beyond a reasonable doubt that the minds of at least two of the alleged co-conspirators met in conspiratorial agreement to work together in furtherance of the unlawful scheme charged in the indictment, that is, possession, sale or distribution of cocaine, then that is proof that the conspiracy existed, and the first element would be satisfied.

The period charged, as I mentioned earlier, is from on or about June 27th, 1974 up until June 25, 1976. It is not necessary for the government to prove that the conspiracy started and ended on those precise, specific dates. It is sufficient if it be proved that the

1
2 conspiracy existed and that an overt act was committed
3 in furtherance thereof, and that this defendant became
4 a member of the conspiracy at any point within that time
5 period, between June 27th, '74 and June 25th, 1976.

6 So much for the first element. I'll now
7 speak about the second element which must be proved
8 beyond a reasonable doubt, and that is that the individual
9 membership in the conspiracy on the part of this defendant,
10 Orlando Diaz, has been shown. If you do conclude that
11 a conspiracy as charged existed, you must next determine
12 whether this defendant on trial before you was a member,
13 that is, whether he participated intentionally in the
14 conspiracy, with knowledge of its unlawful purpose, and
15 in furtherance of its unlawful objectives.

16 In order to find that the defendant was
17 a member of the conspiracy, you must be convinced beyond
18 a reasonable doubt that he knowingly and intentionally
19 participated therein. Thus, mere knowledge by the
20 defendant of the existence of a conspiracy, or of any
21 illegal acts on the part of another conspirator, or
22 mere association with one or more conspirators, is not
23 sufficient to establish his membership in the conspiracy.

24 The government must establish beyond a
25 reasonable doubt that this defendant was aware of its basic

2 purposes and objects and that he joined and entered into
3 the conspiracy with the specific criminal intent, that is,
4 with a purpose to violate the law pertaining to narcotics.

5 So if the defendant, with an understanding
6 of the unlawful character of the conspiracy, intentionally
7 engages in actions or advises or assists for the purpose
8 of furthering the illegal undertaking, he thereby becomes
9 a knowing and willful participant in the conspiracy,
10 and the second element of count one may be found to have
11 been satisfied.

12 You will recall that during this trial I
13 received some evidence, members of the jury, subject to
14 connection, and because the case must, of necessity,
15 come to you piece by piece, it is proper for evidence
16 to be received in that way, and the Court shall later
17 rule whether the evidence may be considered at all, and
18 if so, whether it may only be considered for a limited
19 purpose.

20 That evidence that I received subject to
21 connection may now be received by you for whatever weight
22 and value and significance you, the jury, find it possesses,
23 bearing in mind that you are the sole judges of the
24 facts, and you decide and resolve all factual issues,
25 but as to certain of this evidence, you may consider it

only for a limited purpose.

You will notice that most of those matters as to which objection was made, and as to which I ruled that certain evidence was to be taken subject to connection, were objections taken as to events or conversations taking place when this defendant was not present at the time of the conversations being testified to, or the incident being described.

As to the defendant, if you find that he was not present at the time of a conversation in furtherance of the conspiracy, or was not present at the time of an incident which occurred in connection with achieving the objects of the conspiracy, you cannot consider that testimony or conversation or event as bearing upon his membership in the conspiracy.

Whether he joined the conspiracy knowingly and willfully, and with knowledge of at least some of its unlawful objectives, must be determined as to him solely on the basis of what he said or did, or what took place in his presence, and not on the basis of what somebody else did when he wasn't there and not participating. But such evidence may be relied upon by the jury and considered in connection with the first element of count one, insofar as concerns the issue of whether or not

1
2 a conspiracy existed as charged. As to that purpose you
3 may consider such evidence. But in determining whether
4 Orlando Diaz knowingly and willfully became a member,
5 or a link in the chain that carries the cocaine to market,
6 you may consider only the evidence pertaining to his
7 own acts and conduct.

8 The jury may consider that a person engaged
9 as a participant, or as a link in the chain in a wholesale
10 narcotics distribution business, must recognize that there
11 are other people involved in it and that he's playing a
12 part in a broader scheme or criminal enterprise. However,
13 it is not necessary that the defendant on trial before
14 you be shown to have known all the details of the
15 conspiracy, or even that he was acquainted with all the
16 other members, so long as he knew the basic general
17 purpose of the conspiracy and acted intentionally and
18 willfully in furtherance of it, so as to make it an
19 undertaking which he desired to succeed and to help
20 it in its stated purpose, which is alleged to have been
21 the distribution of cocaine.

22 The third element of the conspiracy charge
23 is that it must appear to your satisfaction beyond a
24 reasonable doubt that at least one of the conspirators
25 named in the indictment, and it doesn't have to be

1 Mr. Diaz, committed an overt act in the Southern
2 District of New York, as listed in the indictment.

3 I will read these overt acts in a moment,
4 and ask that you pay close attention to them. Overt is an
5 old word which simply means open or observable. An
6 act is overt when somebody could have seen it happen
7 had they been there, or where it was seen to happen.
8

9 In order to find that the third element has
10 been satisfied you must find beyond a reasonable doubt
11 that at least one of the overt acts was committed
12 within the Southern District of New York and that
13 district includes New York County, or the Borough of
14 Manhattan, however you wish to call it.

15 An overt act is any step, action or
16 conduct which is taken to achieve, accomplish or further,
17 the objective of the conspiracy.

18 The purpose of requiring proof of an overt
19 act is that while parties might conspire and agree to
20 violate the law together, after they have reached that
21 agreement they may change their minds and they may do
22 nothing to carry it into effect, in which event it would
23 not constitute a crime, it would only be talk.

24 But an overt act, which is an essential
25 element to the crime of conspiracy, need not be a criminal

act nor need it be the crime which is the object of the conspiracy.

I will now read the four overt acts:

One, on or about June 27th, 1974, defendant Louis Valerio met with an undercover officer of the Drug Enforcement Administration.

Two, on or about June 28th, 1974, defendant John Doe, also known as Felix, showed the undercover officer a plastic bag containing white powder.

Three, on or about June 28th, 1974, defendants Louis Valerio, John Doe, also known as Felix, and John Doe, also known as Felix' brother, met at 42 Sickle Street, New York, New York.

I might say to you that the Bronx is also a part of the Southern District of New York.

The fourth act is, on or about June 28th, 1974, defendant Orlando Diaz handed a bag of cocaine to defendant John Doe, also known as Felix.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in any particular overt acts, since the act of anyone done in furtherance of the conspiracy, becomes the overt act of all the members.

Also, the government is not required to prove

each of the overt acts alleged. It is sufficient if it proves the commission of at least one of them at or about the time alleged, and the overt act need not have occurred at the precise time or place alleged in the indictment so long as the time or place is identified with sufficient certainty.

So much for count one. If you are convinced beyond a reasonable doubt that the government has proven all three of these essential elements of count one beyond a reasonable doubt, then it is your duty to convict the defendant on that count. If you aren't satisfied beyond a reasonable doubt as to any of the elements, then you must return a verdict of not guilty on count one.

I will turn to the third count of the indictment, which I previously mentioned as a substantive count. The statute which the defendant is alleged to have violated is Section 841(A)1, Title 21 of the United States Code. I mentioned earlier you don't have to remember these numbers, but it is important, you see, you know what conduct is forbidden by the statute. That statute reads in pertinent part as follows:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to

distribute a controlled substance."

Section 812 of Title 21 of the United States Code creates schedules, which are numbered, and Schedule 2 of these lists cocaine, or cocaine hydrochloride as a controlled substance. I instruct you that cocaine hydrochloride is, under that statute, a controlled substance, the possession with intent to distribute of which, or the distribution of which, would constitute a violation of Section 841(A)1.

Count three of the indictment also makes reference to Section 2 of Title 18 of the United States Code, and that section provides in pertinent part, "Whoever commits an offense against the United States, or aids, abetts, counsels, commands, induces or procures its commission, is punishable as a principal."

Before you may find this defendant guilty of the crime charged in count three of the indictment, you must be convinced beyond a reasonable doubt that the government has proved each of the following three elements, and I am about to state the three elements for count three.

First, that on or about the date alleged the defendant did distribute or possess with intent to distribute a narcotic drug controlled substance, that is,

1 cocaine, or that he aided and abetted some other person
2 in doing so.
3

4 Second, that on that occasion the defendant
5 did so unlawfully, willfully and knowingly, and third,
6 that the substance contained in Government's Exhibit 2 is
7 a narcotic drug controlled substance, that is, cocaine, or
8 cocaine hydrochloride.

9 I caution you that Exhibit 1 has nothing
10 to do with count three. Count three is based solely on
11 Exhibit 2.

12 I will now read count three of the
13 indictment. Count three:

14 "The Grand Jury further charges on or about
15 the 28th day of June, 1974, in the Southern District of
16 New York, Louis Valerio, Orlando Diaz, John Doe, also known
17 as Felix, and John Doe, also known as Felix' brother, the
18 defendants, unlawfully, willfully and knowingly did
19 distribute and possess with intent to distribute a
20 Schedule 2 narcotic drug controlled substance, to wit,
21 approximately 110 grams of cocaine hydrochloride."

22 Now, the first element which you must find
23 beyond a reasonable doubt in order to convict the
24 defendant of the crime charged in count three is that on
25 or about the date charged, the defendant distributed or

2 possessed with the intent to distribute a narcotic drug
3 controlled substance, or that he knowingly and willfully
4 aided and abetted somebody else in doing so.

5 What is meant by the words, "distribute,"
6 and, "possess with intent to distribute," as they are
7 used in the statute?

8 Well, at the outset you will notice in the
9 statute these terms are stated in the alternative,
10 therefore, you may find the first element established, if
11 you are satisfied either that he distributed or that he
12 possessed with intent to distribute. You need not find
13 that he did both in order to convict.

14 I instruct you that the term "distribute"
15 means the actual or attempted transfer of a controlled
16 substance. A transfer in this context could be a
17 sale of a controlled substance, cocaine, for money. That
18 would constitute a distribution.

19 As to the phrase "possess with intent to
20 distribute," the word possess has its common, everyday
21 meaning, that is, to have something within one's control
22 physically. Having the cocaine in one's pocket, or
23 in his hand obviously meets this requirement. The
24 word "intent" refers to a person's state of mind.
25 The term "possess with intent to distribute" can be fairly

1 BSpa
2 said to mean to control a package of cocaine with the
3 state of mind to transfer it to some other person.

4 The second element requires that the government
5 prove beyond a reasonable doubt with regard to the particular
6 count which you are considering, that the defendant
7 acted unlawfully, willfully and knowingly. Now, you
8 recall I used those words in my discussion in the conspiracy
9 count, and the same definition which I am about to give you
10 will apply to your considerations as to count one.

11 These are important words. What do they
12 mean? Well, let's say first what they don't mean.
13 They don't mean that the government must show that a
14 defendant knew he was breaking a particular law before
15 he may be convicted of a crime. They don't mean that
16 the government has to show that the defendant intended
17 to profit at the expense of any other person, nor do
18 they have anything to do with his personal or private
19 reasons for violating the statute, for, if after considering
20 all of the evidence in accordance with my instructions
21 to you, you come to the conclusion that the defendant
22 violated the statute, then in that event his personal or
23 private reasons for violating the statute are of no
24 consequence as far as guilt is concerned.

25 I instruct you that these words knowingly and

willfully mean deliberately and intentionally. In other words, you must be satisfied beyond a reasonable doubt that the defendant acted with knowledge, conscientiously and in the free exercise of his will. The words knowingly and willfully are opposed to the idea of an inadvertent or accidental occurrence.

An act is done knowingly if it's done voluntarily and purposely and not because of mistake or accident or negligence, or some other innocent reason.

An act is done willfully if it's done knowingly and purposely and not because of mistake.

As to the meaning of the word "unlawfully" I think I told you it is not necessary that he know that he was violating any particular statute, rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his act.

Knowledge and intent exist in the mind, members of the jury, and you can't look into somebody's mind and see what is going on. The only way you have for arriving at a decision on these matters of intent and knowledge is to take into consideration all the facts and circumstances shown by the evidence, including the exhibits,

2 and to determine from all such facts and circumstances
3 whether the requisite knowledge and intent were present
4 at the time in question.

5 Direct proof is not necessary. Knowledge
6 and intent can exist in the mind and can be inferred
7 from all of the surrounding circumstances.

8 As to the third element, the government
9 must prove beyond a reasonable doubt that the substance
10 which was possessed with intent to distribute,
11 if there was one, was in fact cocaine. To meet its
12 burden the government need not produce the chemist, although
13 you have a stipulation as to what the chemist would testify
14 to if called. Just as with any other component of a crime,
15 the existence and nature of the narcotics may be
16 proved either by direct or circumstantial evidence.

17 You may consider the fact that the testimony
18 in this case is that the substance appeared to be a white
19 powder; that the persons handling the powder dealt with
20 it as if it were in fact cocaine; that the persons
21 who dealt with it dealt with it clandestinely, secretly,
22 and that substantial prices were paid for it.

23 You may also consider the stipulated
24 testimony of the chemist.

25 You should consider all of the surrounding

1
2 circumstances in determining whether the substance
3 charged in the third count, and that is Exhibit 2, was
4 in fact cocaine. If you aren't convinced that it was,
5 then you must return a verdict of not guilty on the
6 third count.

7 A word about aiding and abetting. Any person
8 who commits an act in violation of a federal criminal
9 statute commits a crime. You will also recall that
10 Section 2 of Title 13 of the United States Code, which
11 I read to you, provides that a person who aids and abets
12 another person, somebody else, to commit a crime is just as
13 guilty of that crime as if he committed it himself, and
14 it is not necessary for the government to show that Orlando
15 Diaz physically committed the crime charged in count three
16 of the indictment, although it contends that he did.

17 You may find the defendant Orlando Diaz
18 guilty of the offense charged in count three even if he
19 didn't actually distribute or possess with intent to
20 distribute, if you find beyond a reasonable doubt that
21 one of the other persons named therein committed the
22 offense with which he's charged in that count, and that
23 Orlando Diaz aided and abetted that person, and did
24 so knowingly and willfully.

25 Thus, it is not necessary for you to find that

1 he actually performed each of the acts of the crime
2 of distribution or possession with intent to distribute
3 cocaine. Under the aider and abettor theory, however, the
4 government is required to prove beyond a reasonable doubt
5 that either Mr. Louis Valerio or John Doe, known as Felix,
6 or John Doe known as Felix' brother, or all of them, or
7 one or more of them, did in fact perform each of the acts
8 of the crime of distribution or possession with intent
9 to distribute cocaine, as charged in count three, and
10 Mr. Diaz knowingly and willfully aided and abetted the
11 commission of this specific offense by one or more of
12 those people.
13

14 Well, what does it mean to aid and abet
15 in the commission of a crime? A person who shares in
16 another person's criminal purposes and encourages
17 and assists the other to carry out that purpose makes
18 himself an aider and abettor, and is punishable under the
19 law as a principal.

20 There is no precise rule as to what acts
21 a defendant must perform in order to constitute himself
22 an aider and abettor in the crime of another person. It's
23 enough if a defendant in some manner associated himself
24 with the illegal venture, participated in it as something
25 he wished to bring about, or that he sought by his actions

to make it succeed and had a stake in the outcome.

I must remind you that you may not find Mr. Diaz guilty of aiding and abetting unless you are satisfied beyond a reasonable doubt that the crime of distributing or possession with intent to distribute cocaine was committed by either Louis Valerio or Felix or Felix' brother, or one or more of them, and that this defendant Diaz conscientiously and purposely associated himself with the crime, with the intent that his conduct would help them succeed in distributing cocaine to undercover Agent Marrero.

Merely being a bystander at the scene of a crime committed by another will not make one an aider and abettor. The law is clear that specific criminal intent must be shown in the minds of both the alleged principals, Mr. Valerio and Felix and Felix' brother, or one or more of them, and the alleged aider and abettor, here, Mr. Diaz, beyond a reasonable doubt before you can convict Mr. Diaz as an aider and abettor.

As I said to you, under that count there are two separate theories under which the government is proceeding. One is that he actually possessed the cocaine himself, had it in his pocket or had it in his hand with the intent to distribute it, and the other theory they are

2 probably under is that he was aiding and abetting, as
3 I've just defined those words, one of these other three
4 people in doing something.

5 Now, when I use the words "specific
6 criminal intent," that is something which must be shown
7 with respect to both counts in the indictment, I mean
8 "specific intention to do an act which violates the
9 statute." It is not necessary that a defendant know the
10 particular law which he is violating, and it is not
11 necessary for the government to show that he read the
12 statute or had any actual familiarity with the rules, but
13 he must intend to do the act itself which the law forbids;
14 that is, either to possess or distribute cocaine or to
15 aid these other people and assist and abet them in
16 doing so.

17 Just a few more words members of the jury,
18 and I'm almost finished. On your oath as jurors you
19 cannot allow any consideration of the punishment or possible
20 sentence which might be inflicted upon the defendant if
21 convicted to enter into your verdict deliberations in any
22 way, or in any sense to affect your verdict.

23 The duty of imposing sentence rests
24 exclusively on the Court. Your function is to weigh the
25 evidence in the case and to determine separately as to each

count, whether or not this defendant has been proven guilty beyond a reasonable doubt, and to do so solely on the basis of the evidence and the law. You are to decide this case on the evidence and the evidence alone, and you must not be influenced by any assumption or conjecture or sympathy, or any inference not warranted by the facts, unless proven to your satisfaction.

If you fail to find beyond a reasonable doubt that the law has been violated by this defendant as charged, you should not hesitate for any reason to find a verdict of acquittal, or not guilty.

But, on the other hand, if you should find that the law has been violated as charged, you should not hesitate, because of sympathy or any other reason, to render a verdict of guilty as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this.

A word about deliberating. Each of you is entitled to your own opinion and you should express your opinion to the other jurors, and you should listen to the views of the other jurors. That's the purpose of jury deliberations, to discuss, and to consider the evidence, and to listen to the arguments of the other jurors, and to present your individual views, and to consult with

1
2 one another, and reach a just and fair verdict based solely
3 and wholly on the evidence, if you can do so without
4 violence to your individual judgment.

5
6 Each one of you must decide the case for
7 himself or herself after a discussion with the fellow
8 jurors. You shouldn't hesitate to change your opinion,
9 if, after discussion your opinion appears erroneous in
10 the light of the discussions, and a review of the evidence,
11 and a consideration of the law. However, if after carefully
12 weighing all of the evidence, and listening to the argument
13 of your fellow jurors, you entertain a conscientious view
14 that differs from the others, you are not to give up your
15 judgment and go along simply because you are outnumbered
16 or outweighed.

17 The final vote of each of you will reflect
18 your individual conscientious judgment as to how this case
19 should be decided.

20 As to any count, in order to find a
21 verdict, the jury must be unanimous on that count.

22 I ask you to take your time in your
23 deliberations, to be polite and respectful to each other,
24 and to listen and to express your own views and listen
25 to the views of others.

Perhaps in your deliberations you may desire to see some of the exhibits, or all of them, or you may want some portion of the testimony read to you, or you might find that you are uncertain as to the meaning of some part of my instructions. If any of these matters occur, then send out a note to the Court, asking for what you want. In writing the note, do not state how the vote of the jury may then be divided. That is not to be put in any note.

Please, before you ask to have testimony read to you, exhaust your own collective recollection by discussing it with each other first because the total memory of twelve people is generally better than the memory of a single person.

Ordinarily, after you discuss it, it will come back to you. But if you find you really need to have something read to you then send out a note and tell me specifically what it is you want to have read. If you send out for a copy of the indictment by a note, that also will be sent in to you, but as I said earlier, the indictment is merely a charge or an accusation and it has no evidentiary value.

Mrs. Reilly will be the foreman and she will send out any communications by delivering a note

to the U.S. Marshal.

When the jury has reached a verdict,
simply tell the marshal the jury has reached a verdict.

Let me state to you in closing, your oath
covers your duty, and that is without fear or favor to
anyone you will well and truly try the issues in this
case between the defendant and the government of the
United States, and a true verdict give based solely on
the evidence and the Court's instructions as to the law.

It is important to the defendant. It's
important to the government. It's important to
each of you.

Before you leave the jury box and commence
your deliberations, I ask you to remain there silently
and not to discuss the case, while I confer in the
next room with the attorneys to see if there is any
additional matter which they would like to have me
mention to you.

That will only take a few minutes. As
soon as I finish that you will be able to start your
deliberations in the jury room.

Please sit there and remain quiet for
the time being. If the attorneys and the court reporter
would step inside, please.

Marshal, take charge of the jury and keep them where they are, please.

(In the robing room.)

THE COURT: Mr. Duhamel, do you have any additional requests or any exceptions?

MR. DUHAMEL: Not specifically, your Honor. I waived one, that was something I wasn't sufficiently well prepared for on count three, and I don't think it --

THE COURT: What is that?

MR. DUHAMEL: The inclusion of the Section 2, aiding and abetting. I think possibly or arguably it would lend itself to a different interpretation, but it is not sufficient to justify a reconstruction.

THE COURT: The government witnesses said he had it in his hand or in his pocket.

Do you have anything, Mr. Joy?

MR. JOY: On the question of identification, your Honor listed a number of factors, such as opportunity to observe, length of time and so on. I would like you to add that one of the factors they should take into account is the lapse of time between the original viewing, if any, and the time that a later identification was made.

THE COURT: And the time of the in-court identification?

↓ Def counsel
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that later it was
at I. D.

MR. JOY: Yes.

THE COURT: I think that that is in there by implication, and I think your request comes a little late.

One thing I didn't tell them, I thought of doing it and I didn't want to say anything that might be interpreted as conveying any particular attitude on this subject, but you know, they are entitled to take that license plate, even if he wasn't driving it, and there is some evidence that he was at one point driving it, and using that as some corroboration for their identification. But you gave me no formal request to charge and I think I covered it reasonably well.

MR. JOY: I gave you the charge which I read on the record this morning and which you said you would charge in substantially those terms.

THE COURT: I decline to modify it further at this time. I think it is implicit --

MR. DUHAMEL: If I may add one thing, too. It lends itself to a very awkward situation, too, of trying to -- talking about lapse of time, is it lapse from the instance to now, from the instance of the arrest, from the instance of the prior trial which Mr. Joy continues to refer to --

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2 THE COURT: The record doesn't show that they
3 identified him at the prior trial.

4 MR. DUHAMEL: I don't think there should be
5 any reference to the prior trial at all.

6 MR. JOY: It's been two and a half years
7 now.

8 That certainly is a large factor --

9 THE COURT: I don't think there is a real
10 identification problem in this case, frankly.

11 MR. DUHAMEL: Unless the Court would
12 like to get in also the mug shots they identified --

13 THE COURT: Oh, no.

14 MR. DUHAMEL: That's what I'm saying.

15 THE COURT: You can have an exception,
16 Mr. Joy.

17 MR. JOY: Along those lines, I think
18 your Honor again stated that the -- in the course of
19 giving that instruction, that each one of the
20 officers testified to seeing the defendant, which I would
21 object to on the grounds that it strengthens in the mind
22 of the jury that somehow --

23 THE COURT: Did I misstate the record? I
24 told them that their recollection of the testimony
25 controlled over anything I might say.

MR. JOY: That's right. That was at a far earlier --

THE COURT: I will emphasize that again. I'll tell them that anything I said about the testimony is not to be substituted for their own recollection.

MR. JOY: Okay.

THE COURT: None of you told the jury that Marrero shook his hand and accepted his apology for the lateness of the delivery.

MR. DUHAMEL: I did, your Honor, in summation. I said it in opening argument, in summation and it came out in the evidence.

THE COURT: I didn't hear it, but maybe you did.

MR. DUHAMEL: I did, your Honor.

MR. JOY: Then with respect to your Honor's charge talking about the conspiracy with cocaine moving from South America up here, there is no testimony whatever that the cocaine was in South America or came from there --

THE COURT: I said, "Or wherever it came from." It can't come from the United States, as I understand it, it isn't grown here.

MR. JOY: The impression that I'm afraid your Honor conveyed to the jury is that this was some part of a worldwide scheme and --

THE COURT: It is.

MR. JOY: That may be, but there was no evidence in this case that it was.

THE COURT: The cocaine came from wherever it came from to New York in some fashion, and there was, in my view, a single conspiracy, most of the members of which don't know the others.

MR. JOY: The final one being that when you were -- I think your Honor characterized the manner in which the cocaine or alleged cocaine was dealt in as clandestine, that, "People dealt with it in a certain way."

I think that again is characterizing for the jury, which they may then say that it's been established that --

THE COURT: I will reiterate that they are the sole judges of the fact and anything I said concerning evidence is only meant to illustrate points of law and that they are not to take anything I said in lieu of their own recollection.

I want to say to you it was dealt with

candestinely, they refused to transact it in the social club, they had to go to a different place. All right.

(In open court.)

THE COURT: I have only one additional thing which I wish to say to the members of the jury, and that is to reemphasize again that you jurors are the sole judges of the fact, and anything that I say concerning any matters in evidence, or any facts, or any inferences drawn from facts, is not to be substituted for your own recollection and your own inferences, and anything I said of a factual nature in my instructions to you was said only for the purpose of illustrating with respect to points of law and attempting to make them understandable to you. But if I said anything that doesn't accord with your recollection of the evidence, put it out of your mind. Go by your own recollection, because you are the sole, exclusive judges of the facts, and you draw the inferences from the evidence, and you determine what evidence is credible and what is not.

I know I have told you that already, but I want to emphasize it one more time before you leave me and commence your deliberations, which you may now do.

Please escort the jury into the jury room.

(Whereupon, at 3:17 P.M. the jury retired to commence deliberations)

THE COURT: We will be in recess, gentlemen.

(Recess taken.)

(At 4:45 P.M. Court's Exhibit 2 was
marked.)

THE COURT: Gentlemen, in United States
against Diaz, at 4:45 we received a note which is marked
Court's Exhibit 2.

Between that period of time, for the next
ten minutes, both telephone lines were busy and the Court
was unable to obtain the presence of either attorney.
The note is relatively simple. It reads as follows: "May
we have the record number 3 where the license was first
found, police report 1 or 3, A.C."

I interpreted that to be a request for
Government's Exhibit 3, and Defendant's Exhibit A-1,
and both of those matters were sent into the jury room,
without any comment or anything else, and there has been
nothing heard from the jury as to this note, so I assume
we complied accurately.

Now we have another note which says, "May
we have Detective Bisbee's report."

My understanding is that that report is
not in evidence and was permitted to be used solely
to refresh the recollection of the detective, or to impeach

his testimony.

What do you want me to tell the jury?

MR. JOY: Your Honor, I would suggest that you tell the jury just what you have said and add that if they want the testimony of Sergeant -- of Officer Bisbee about his report they can have that.

THE COURT: I don't want to volunteer information to them.

MR. JOY: Except that I think it is clear from the note that that's what they are looking for, the information that was contained in the officer testifying as to the basis of the report which was given to him to refresh his recollection.

MR. DUHAMEL: I would agree with your Honor's suggestion, to put it as simply as possible, and that would be merely that that document is not in evidence, consequently, it can't be sent in to them.

THE COURT: I think just to tell them it is not in evidence is not very good. I think I should explain to them that it is not received in evidence; that, such a document is permitted solely for the purpose of refreshing recollection or impeaching testimony.

MR. DUHAMEL: I would suggest to your Honor that it was for the purpose to attempt to refresh

recollection, or attempt to impeach testimony.

I am somewhat bothered by any other characterization.

MR. JOY: I think it has to be more than attempt, because in fact after reading it he then testified regarding the information thereon.

MR. DUHAMEL: He testified that it was --

THE COURT: I will bring them in the courtroom and explain it to them.

Bring in the jury, please.

(5:15 P.M., the jury entered the courtroom.)

THE COURT: Members of the jury, I have your most recent note, which has been marked Court's Exhibit 3, and it says, "May we have Detective Bisbee's report?"

Since I am unable to comply with that request I thought I should ask you to come back into the courtroom so I can explain it.

That particular document is not in evidence. For that reason it's not proper for me to permit it to be taken into the jury room, or examined by you.

Some documents in a case are merely marked for identification and they are used for the limited

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2 purpose of forming a basis for questions to bring out oral
3 testimony, and it's proper to mark such a document in
4 evidence and read from it to a witness or let a
5 witness read it, and ask him about matters therein
6 contained. That's all that was done with Detective
7 Bisbee's report.

8 Detective Bisbee's testimony is properly
9 before you, but the report itself is not evidence in
10 the case for reasons of a legal nature which I think I have
11 probably explained, but which are not of your concern.

12 While I have you in here also, Mr. Holtzer,
13 if you would give the marshal your telephone number,
14 which you can give him privately after you leave the
15 courtroom, there is a message from the jury clerk downstairs
16 to the effect that your wife was calling and if you want,
17 the marshal will call your wife and find out what the
18 message is, he will do that.

19 You don't have to do it that way. If
20 you want to just wait and let it go, you can do that.

21 I also would like the jury to consider, and
22 let the Court know, how late you are willing to stay. I
23 have in mind that you may come to a time when you would
24 like to go home and then return first thing tomorrow
25 morning and resume your deliberations, so if you come to

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2 that point, you just send out a note and tell the Court
3 what your wishes are. The foreman will write a note and
4 tell how long you wish to stay, and I won't require you
5 to stay any longer than that.

6 If you want to stay for dinner, that
7 would be at about 7:30. If you stay real late we
8 can probably get limousines to take you home, but if
9 you want to break before that time, it's all right.

10 Before you leave I probably will ask you
11 whether there is either count as to which you definitely
12 have a final verdict which you'd like to announce, but you
13 don't have to announce them unless you are ready to do
14 so. You can wait until you've decided both counts or
15 you can decide one and resume the other tomorrow,
16 whatever you'd like to do, or you can hold both until
17 tomorrow. It's entirely up to the jury, and the Court
18 will accommodate its schedule to whatever suits the jurors.

19 Please withdraw to the jury room. If you
20 want to give the phone number, Mr. Holtzer, you can do
21 that. You don't have to.

22 (Whereupon, at 5:20 P.M. the jury resumed
23 deliberations.)

24 (In open court, jury present.)

25 (At 5:15, Court's Exhibit 4 was marked.)

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2 THE COURT: Members of the jury, I have
3 your note which indicates that you want to recess for the
4 day. We will resume tomorrow and of course, that's
5 perfectly satisfactory to the Court. I would ask you to
6 all assemble in this room at 9:30 tomorrow morning to
7 resume your deliberations in the jury room here. I
8 ask you not to start your deliberations until all
9 twelve jurors are present, until everybody gets in the room
10 and can hear and participate equally. Don't discuss
11 the case.

12 Furthermore, I direct you again do not
13 discuss the case at home or discuss it with anybody else
14 or speak to anybody or go any place that's involved in
15 the trial or read anything in the papers or hear any
16 television or radio or anything that might affect your
17 ability to give a fair and impartial verdict.

18 One last thought. It is absolutely
19 important that all of you be here tomorrow morning
20 because now the jury is down to twelve and there are no
21 alternate jurors any more. So, it is essential to give
22 a verdict and all twelve of you be here. Please, all
23 of you stay in good health and return promptly at 9:30
24 tomorrow morning.
25

JUROR NO. 5: I hear there is a slim chance it might snow tomorrow.

THE COURT: Do the best you can.

JUROR NO. 5: I live forty miles north of here. In case I get snowbound, what should I do?

THE COURT: Where do you live?

JUROR NO. 5: I live in Rockland County.

THE COURT: Could you come by bus?

JUROR NO. 5: I drive in every day.

THE COURT: Don't you have a railroad out of Suffern up there?

JUROR NO. 5: That's about eight or ten miles northwest of me. I usually take my car in.

THE COURT: Will you make every possible effort to get in. If you get here late, the rest of the jurors will just wait until you get here. Please, start early. The essential part is that a verdict requires the participation of all twelve. I hope we don't have a bad snow, but if we do, I am going to ask you to do all you can so that the case can be resolved by your being here and participating. Would you do that please?

JUROR NO. 5: Yes.

THE COURT: Don't they have a bus line up there?

JUROR NO. 5: There is, but I leave roughly at quarter of six in the morning and the bus doesn't start quite that early.

THE COURT: Do the best you can.

JUROR NO. 5: Yes, sir.

THE COURT: You are excused with the thanks of the Court. Return at 9:30 in the morning.

(Jury excused from the courtroom.)

THE COURT: Give the jury a moment or two to get out of here and then we will recess for the day. You can be back here at 9:30 in the morning. Mr. Diaz, it is your duty to be here at 9:30 in the morning under your bail arrangements. Do you understand?

THE DEFENDANT: Yes.

THE COURT: The court will be in recess.

(Court adjourned to 9:30 A.M., December 10, 1976.)

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UNITED STATES OF AMERICA,

vs.

76 Cr. 599 CLB

ORLANDO DIAZ,

Defendant.

December 10, 1976.
10:00 A.M.

(Trial resumes.)

(Note received from the jury at 9:50 A.M.

marked Court's Exhibit 3.)

(In open court.)

THE COURT: Gentlemen, I have a note here which says, "May we have Officer Bisbee's testimony regarding the identification of the green car." That note was received a couple of minutes ago at 9:50.

The main thing is -- I would like you to confer with the court reporter as to what portions of it are responsive to the request.

MR. DUHAMEL: Yes. That might take some discussion between the parties.

THE COURT: As soon as you are ready, please let the Court know.

(Recess.)

(In open court.)

MR. DUHAMEL: Your Honor, if I might frame the problem for the record -- I think everybody is here -- it seems unclear from the note as to whether or not they are

1 requesting testimony regarding the identification of
2 the vehicle, regarding information received from the
3 Department of Motor Vehicles, or regarding Officer
4 Bisbee's direct testimony regarding his personal observations
5 and identification of the vehicle.
6

7 Or if they are going to the information
8 from the Department of Motor Vehicles, it seems as though
9 it would pretty much include all his testimony, because it
10 would go to the accuracy of the report and so on.

11 THE COURT: I think the note is quite clear.
12 I don't know why you should have any difficulty with it.
13 I am not going to waste a lot of time construing it. I
14 will just have the reporter comply as best he can, that's
15 all.

16 MR. JOY: I would suggest, your Honor,
17 since the questions of identification of the car are
18 scattered throughout the testimony of Officer Bisbee, to
19 make sure we don't miss any of them, I would suggest
20 that, since the testimony, I don't believe is very long,
21 that the entire testimony be read back.

22 THE COURT: I think perhaps that is a
23 practical resolution to the problem. All right. Bring in
24 the jury. I will have Bisbee's testimony read. Not
25 questions that were objected to or stricken out.

MR. JOY: There was one thing about five cars that he testified to that I objected to as not being responsive, and I think your Honor struck that out.

THE COURT: What was stricken out won't be reread unless it's done so by accident.

It is not that easy to read testimony.

(At 10:20 A.M. the jury entered the courtroom.)

THE COURT: Good morning, members of the jury. I have your note here which says, "May we have Officer Bisbee's testimony regarding the identification of the green car." I have had a little difficulty separating out these tapes of the testimony of Officer Bisbee, and I think to be on the safe side I'm going to ask the court reporter to read you his entire testimony. I don't think it will take too long.

Ordinarily I would try to narrow it down, but it's proved to rather difficult to do. All right. Would the reporter please read the direct and cross examination of Detective Bisbee.

(Record read.)

THE COURT: Members of the jury, please return to the jury room and continue your deliberations.

(At 10:45 A.M. the jury resumed deliberations.)

2 (In open court, at 2:45 P.M.)

3 THE COURT: We have a note. The note says,
4 "We seem to be unable to make a decision on this case."

5 Have you ever heard of any such thing,
6 either of you?

7 MR. JOY: Yes.

8 MR. DUHAMEL: I haven't, your Honor,
9 but I'd be ready to start again tomorrow.

10 THE COURT: Not with me. Back in the
11 wheel you go. All right. I will give them a modified
12 Allen charge and see if we can get them to go a little
13 longer.

14 MR. JOY: Judge, can I hand up a modified
15 version of the Allen charge, which Judge Tenney gave?

16 THE COURT: Well, it didn't work last
17 time, did it?

18 MR. JOY: Well, there is precedent for it.

19 MR. DUHAMEL: Your Honor, I'm not familiar
20 with this --

21 THE COURT: I'm not going to waste any more
22 time. I'm just going to do the best I can with it.

23 (Jury present.)

24 THE COURT: Members of the jury, I have
25 received your note which says, "We seem to be unable to

make a decision in this case."

I assume from this case that you are unable to decide either count one of the indictment or count three of the indictment, each of which, as I explained to you, calls for a separate decision, a separate verdict on your part. I fear that perhaps your unwillingness or inability to reach a unanimous verdict on any count may stem in some part from your failure to pay attention to the instructions given by the Court. One of the things I said to you -- of course there's no way I can compel you to do it, but I did suggest to you that each of you has an equal voice in reaching your verdict and that you ought to discuss the case sensibly, courteously and politely with each other. That's the function of jury deliberations, to present your own views in a reasonable, intelligent way and listen to the views of the other jurors in a fair and reasonable fashion and it's quite clear to me, because my office is right in here, that you have been shouting at each other and you have been raising your voices, and I must say that's inconsistent with reasonable, intelligent deliberation, and if you will only go back, when I finish my remarks, and talk with each other a little further and do as I suggest to you, don't try to shout, don't be critical of each other, don't be proud, don't be

arrogant, be reasonable, talk, give your views and listen and consider the views of the others.

Now, of course, after you've done that, then I want to reemphasize, no one should surrender his or her honest conviction as to how this case should be decided solely because of the opinion of the others or merely to get finished or to be able to return some kind of a verdict. Each of you has to decide this case for yourself, conscientiously and in accordance with the facts and the law, but before you come to the end of your work you should listen carefully to what the others say and you should present carefully the reasons that you have for any positions that you may have.

Now, there doesn't seem to be any reason to believe that this case could be tried again by either side better or more fully than it was tried before you, and I don't believe that any twelve ladies and gentlemen who would be selected next week or next month in this courthouse to hear this case would necessarily be any better or any different or any smarter or any more, onscientious than you ladies and gentlemen are. I have watched you during the trial here. You have all paid close attention, you have all listened and you ought to be able to discuss these things and work them out according to the

rules of law which have been given to you in accordance with your evaluation of the credibility and truthfulness of the witnesses.

You aren't partisans, you are judges, you are judges of the facts, and your sole interest here is to seek the truth from the evidence in the case and decide how it should be tried and how it should be decided and how it should be determined, and if you will tone down your voices a little bit and be a little patient with each other, you really ought to be able to do it. I will make a further suggestion to you. If you find that you are completely deadlocked on count one, which is the conspiracy count, well, maybe you think the law on conspiracy is a little complicated. I can understand that. Address yourselves to count three and understand what your verdict ought to be on count three. Perhaps today's discussions will assist you in deciding count one, as you explore the evidence further in your discussions, and even if it doesn't, maybe you will be able to determine count three.

Now, I made it clear to you that in any case, in order to make a decision practical, the law imposes the burden of proof on one side or the other. That's true in civil cases. It's true in this case.

2 Now, as I told you in this case earlier, the
3 law provides that the burden of proof is on the
4 government as to whichever counts you are then considering,
5 to prove each and every element of that count to your
6 satisfaction of all twelve jurors beyond a reasonable
7 doubt. Now, I have defined what a reasonable doubt
8 is, I have listed the elements of each count to you. You
9 will remember that each count had three elements. I am
10 willing to review those for you, if you will send out a
11 note and say you want to have me go over that again.

12 Now, you are going to determine the
13 truthfulness of witnesses, and I am not going to review
14 the testimony of the witnesses, but if you believe the
15 testimony of Marrero, and if you are satisfied of the
16 identity of this person as the one whom Marrero saw
17 and heard and talked with, and if you are satisfied that
18 the actions of Marrero : stified to were done willfully
19 and knowingly by the defendant with the specific intent
20 to violate the law as I explained to you, then that would
21 warrant a conviction on count three.

22 By the same token, if you don't believe
23 Marrero or if you believe him but you have a reasonable
24 doubt, the kind of doubt a reasonable person has, if you
25 can give a reason for it, if you have a reasonable doubt

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2 about the truthfulness of the testimony or if you have
3 a reasonable doubt whether the actions testified to were
4 knowingly and willfully done with a criminal intent
5 to possess cocaine with the intention to
6 distribute it or help somebody else do so, then in this
7 case it would be your duty to find a verdict of
8 not guilty.

9 Now, those questions posed to you aren't so
10 difficult, and twelve ladies and gentlemen, selected
11 as you are, ought to be able to discuss all these things
12 together, arrive at a fair decision, relying on all the
13 evidence in the case. I ask you to tone it down a
14 little, be courteous and pleasant to each other, talk
15 reasonably, listen reasonable and see if you can't
16 resolve this case.

17 In the final analysis, the administration
18 of criminal justice rests with the jurors. The jurors
19 are the people of the community and it's for you jurors
20 to decide what's fair and just in cases and whether proof
21 has been satisfied beyond a reasonable doubt or not.

22 If you are satisfied beyond a reasonable doubt,
23 it's your duty to step up and say so, and if it's not,
24 it's your duty to step up and find a verdict of not
25 guilty and you ought to be able to do one or the other

1 given the evidence that's before you and using your
2 common sense. So I ask you, please, try again, but be
3 reminded, I'm not going to coerce the jury, I'm not going
4 to keep you for an unduly long time. Each of you, your
5 vote as to how this case will be decided represents your
6 conscientious determination. You are not to give it up just
7 for the purpose of going along and creating a verdict,
8 but nobody should hold out for no reason or without thinking
9 or without discussing the reasoning of the other jurors.

10 If after discussion you still don't agree,
11 stick to your principles. Now, that's about all I am going
12 to say to you. Go on back in there and try to do your duty.

13 (Jury resumed deliberations.)

14 MR. JOY: May I enter an objection to
15 the Allen type charge that your Honor has given.

16 THE COURT: You have an exception to the whole
17 Allen charge.

18 MR. JOY: I want to point out some
19 difficulties that I see. Number one, your Honor has
20 indicated that you overheard the jury to some extent. I
21 think that --

22 THE COURT: Haven't you heard them?

23 MR. JOY: I have not, your Honor. Of
24 course I'm not as close as you are.
25

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2 THE COURT: This door has been open. You
3 can hear them right where you are right now.

4 MR. JOY: In any event, your Honor, I think
5 the fact that a judge indicates that he can overhear the
6 deliberations, at least some of them --

7 THE COURT: I haven't said that. All I hear
8 is loud voices.

9 MR. JOY: It could have a chilling effect
10 on their deliberations.

11 THE COURT: All I hear is loud voices.
12 If you want me to call them back here and tell them I
13 can't hear any words that are said, I will do that
14 right now.

15 MR. JOY: I want to note these, your
16 Honor.

17 THE COURT: I think it is reprehensible for
18 jurors to start fighting over a case.

19 MR. JOY: That may be.

20 The other thing is that I think that your
21 Honor's indication to the jury that they should leave
22 count one, if that is too difficult for them, and go to
23 count three, may encourage some kind of a compromise
24 verdict where they find the defendant guilty of one
25 count and not the other as a resolution of their problems,

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2 which I think are basically the question of identification
3 which would go, of course, to both counts.

4 Number three, your Honor's restatement,
5 if you believe the testimony of Officer Marrero, without
6 talking about all of the difficulties of the identification,
7 I think again points out the fact that Marrero has
8 testified directly, which again I think might unduly sway
9 them. So that for those reasons I would object to the
10 charge as given by your Honor.

11 THE COURT: You can have an exception to
12 the entire supplemental charge.

13 I have another note from the jury. The note
14 says they want a listing of the three elements for each
15 of the charges.

16 Bring the jury back in, please.

17 (Jury present at 2:55 P.M.)

18 THE COURT: Members of the jury, I have your
19 most recent note, which asks for a listing of the
20 three elements for each of the charges, and I will be very
21 pleased to give you those right now.

22 Before I read them to you, again I do want
23 to amplify one thing that I did say to you. All that I have
24 heard in the end of the courtroom here, or in the hallway,
25 is loudness of voice. I have certainly not heard any words

2 that were said.

3 The law would not permit anybody to listen
4 in on your deliberations, not even the judge, and I certainly
5 would never do it. It would be improper and it would be
6 illegal.

7 The door has been closed at all times
8 and through the door and through the wall, all I heard was
9 loud voices. I didn't hear a single thing you said,
10 any of you and if I did it would be improper for me.

11 So I hope you don't think that I have been
12 listening. I have not been. But I was conscious of the
13 fact that there has been some loud talking or yelling,
14 and I just encourage you not to do that, that's all.

15 I will go to answer your question about the
16 three elements.

17 The three elements, each of which must be
18 proved beyond a reasonable doubt as to count one, are, first,
19 that the conspiracy charged in count one did in fact
20 exist. That is, that two or more persons agreed together,
21 with each other, to violate the federal narcotics laws
22 at some point at or about the time period alleged in the
23 indictment, and in the fashion therein set forth. That
24 is the first element.

25 The second element of count one is that the

defendant Orlando Diaz knowingly and willfully associated himself with the conspiracy and did so with a requisite criminal knowledge and intent. In short, that he became a member of the conspiracy and did so knowingly and willfully.

The third element of the crime of conspiracy as charged in count one is that one of the conspirators, any one of them, committed in the Southern District of New York at least one of the four overt acts set forth in the indictment at or about the time and place alleged.

Those are the three elements. You will remember, I read you the overt acts, what they were as charged, and I have explained those words set forth therein, and if you have any problem with any of those words, and if you want them defined again, of course I would be entirely willing to do that, or anything else that the jurors would like to have the Court do.

About the elements of count three, or the so-called substantive count. I informed you that before you can find the defendant guilty of the crime charged in count three of the indictment you must be convinced beyond a reasonable doubt that the government has proved each of the following three elements:

First, that on or about the date alleged the defendant did distribute or possess with intent to

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2 distribute a narcotic drug controlled substance, that
3 is, cocaine, or cocaine hydrochloride.

4 Second, that on that occasion in doing so
5 the defendant did so unlawfully, willfully and knowingly.

6 You will recall I defined all those words for
7 you, and I will do it again if you want to send out a
8 note on that score.

9 Third, that the substance contained in
10 Government's Exhibit 2 is in fact a narcotic drug
11 controlled substance, that is, cocaine, or cocaine
12 hydrochloride.

13 You will recall I told you that Exhibit 1 has
14 nothing to do with count three. That's only received in
15 evidence in connection with the conspiracy count or
16 count one.

17 You will also recall that instructing --
18 that in the course of instructing you about the elements
19 I did say that you must also be satisfied beyond a reasonable
20 doubt that the identity of the person on trial is the same
21 person -- that the person on trial is the same person
22 with respect to whom the testimony in connection with the
23 activities on June 26th and 27th -- rather, June 28th
24 concerns. I went into that in some detail, and I
25 would repeat the instruction on identification if that's

2 what you want.

3 But the fact of identification is an
4 essential element of either count which must be proved
5 beyond a reasonable doubt.

6 Please return to the jury room. If there
7 is anything else, please send out another note.

8 (Whereupon at 3:00 P.M. the jury retired
9 to resume deliberations.)

10 (Recess.)

11 (In open court, at 5:05 P.M.)

12 (Jury present.)

13 THE CLERK: Madam Forelady, have you agreed
14 upon a verdict?

15 THE FORELADY: Yes, we have agreed upon
16 a verdict.

17 THE CLERK: How do you find the defendant
18 on count one?

19 THE FORELADY: Guilty.

20 THE CLERK: County three?

21 THE FORELADY: Guilty.

22 THE CLERK: Ladies and gentlemen of the
23 jury, listen to your verdict as it stands recorded. You
24 say you find the defendant guilty on counts one and three.

25 (Jury polled, all jurors answered in the
affirmative.